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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* MICHAEL TOD MORMAN and THOMAS HAROLD  
ROESSLER

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Appeal 2009-009304  
Application 10/025,027  
Technology Center 3700

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Decided: May 25, 2010

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Before: WILLIAM F. PATE III, JENNIFER D. BAHR, and KEN B.  
BARRETT, *Administrative Patent Judges*.

PATE III, *Administrative Patent Judge*.

DECISION ON APPEAL

## STATEMENT OF CASE

Appellants appeal under 35 U.S.C. § 134 from a rejection of claims 1, 3, 4, 6, 11-15, 28, 29, 32, and 33. Br. Supp. 2. We have jurisdiction under 35 U.S.C. § 6(b).

We affirm.

The claims are directed to methods for making an absorbent article with elastic cuff areas and necked substrates. Claim 1, reproduced below, is illustrative of the claimed subject matter:

1. A method of producing elastic cuffs for resultant garments obtained from a web assembly of precursor garments, the steps comprising:

a) applying necking tension to the web assembly of precursor garments to neck each precursor garment to provide a percent neckdown of about 20% to about 80% thereby placing the precursor garment at a first width, the precursor garment being extendible to a second non-necked width wider than the first width when the necking tension is removed;

b) affixing strands of elastic material in an untensioned state to a cuff area of each precursor garment while at the first width;

c) removing necking tension from each of the precursor garments with the elastic material thereon and causing the precursor garment to assume the non-necked second width at areas outside the cuff area having the elastic material thereon; and

d) dividing the web assembly of precursor garments into resultant garments;

e) whereby the elastic material holds the cuff area at a dimension narrower than the second width in the resultant garments.

## REFERENCES

The prior art relied upon by the Examiner in rejecting the claims on appeal is:

Buell	US 5,156,793	Oct. 20, 1992
Litchholt	US 5,503,919	Apr. 2, 1996

## REJECTIONS

Claims 1, 3, 4, 6, 11-15, 28, 29, 32 and 33 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Litchholt. Ans. 4.

The rejection of claims 1, 3, 4, 6, 11-15, 28, 29, 32 and 33 under 35 U.S.C. § 102(b) as being anticipated by Litchholt has been withdrawn. Ans. 3.

## OPINION

Although the Examiner has withdrawn the rejection under 35 U.S.C. § 102, Appellants' arguments directed to the rejection of claims 1, 3, 4, 6, 11-15, 28, 29, 32 and 33 as being anticipated by Litchholt are relevant to the Examiner's rejection of claims 1, 3, 4, 6, 11-15, 28, 29, 32 and 33 under 35 U.S.C. § 103(a) as being unpatentable over Litchholt, and are therefore addressed herein.

Appellants argue that Litchholt fails to disclose affixing elastic material to either a "cuff area" of a precursor garment or "a selected area of the web assembly." Br. 7. Appellants contend Litchholt is instead concerned with making a laminate with elastic properties throughout the body of the entire laminate. Br. 8. This is inaccurate. The "cuff area" of a precursor garment is a particular species of a "selected area of the web assembly." The portion of Litchholt cited by Appellants mentions the

possibility of applying the elastic material to only “discrete areas” of the article. Br. 8. Litchholt specifically describes leg cuffs 32 as exemplary of these areas. Col. 25, ll. 21-27; fig. 3.

Appellants further contend that Litchholt does not disclose making an article with “necked” substrates because “necking” refers to a process where a material is tensioned in a first (e.g., a length) direction to cause narrowing in a second perpendicular direction (e.g., a width). Br. 8. And, upon removal of the applied force the material will pull back or relax to near its original width. *Id.* (citing Spec. 9:7 – 10:20). The Examiner takes the position that Litchholt explicitly teaches necking. Ans. 6. However, the Examiner acknowledges Appellants’ argument concerning the alleged lack of “necking” in Litchholt and remarks that, in the alternative, if “necking” is not expressly taught, it would have been obvious. Ans. 5-7. We agree with the Examiner on both points.

Litchholt discloses a diaper backsheet 26 joined with an absorbent core 28 and elastomeric adhesive foam that can be laminated by any of the methods described therein. Col. 24, l. 65 – col. 25, l. 1; col. 25, ll. 35-40. As Appellants point out, the material preferred by Litchholt for use as a backsheet 26 is preferably elongatable, most preferably drawable, but not necessarily elastomeric, so that the backsheet will, upon mechanical stretching, be at least to a degree, permanently elongated such that it will not fully return to its original undistorted configuration when tension is released. Br. 8-9 (*citing* Litchholt col. 26, ll. 33-38). The bulk of Litchholt’s discussion concerning the laminating procedure is also focused on such a configuration. *See e.g.*, col. 19, ll. 14-21.

Appellants' argument is unpersuasive. Firstly, Litchholt's language "to a degree" and "not fully" implies that there is some degree of returning to the original unstretched configuration when tension is released.

Appellants' definition of "necking" involves relaxing of the material to "near" its original width and does not necessarily require a full recovery. Secondly, Litchholt does mention an alternative configuration wherein one or both of the outboard laminae 30a and 30c may be elastically extensible. Col. 18, ll. 58-59. When tensioned, for example by tensioning rolls 328a and 328c, or by some other mechanical stretching, in the longitudinal or machine direction, prior to lamination (*see* col. 18, ll. 6-10; col. 20, ll. 13-51), most elastic materials would undergo elongation in the longitudinal direction and shrinking in at least one transverse direction and, by virtue of their elasticity, would return to their original dimensions when the applied tension is removed. This behavior constitutes "necking" as defined by the Specification. Spec. 9:20-10:8. Identical language is not required.

Even if Litchholt did not expressly disclose "necking," Appellants acknowledge that it is a type of stretching known in the art. *See* Spec. 10:9-20. Appellants do not respond to the Examiner's conclusion that such a technique would be an obvious substitute for prestretching including permanent dimensional changes. Ans. 6-7; Br. 10-12.

We turn to the enumerated contentions on page 9 of the Appeal Brief. First, Appellants' assertion that Litchholt does not disclose a web of precursor garments is inaccurate. Litchholt col. 15, ll. 57-65. Second, the Examiner never alleged that Litchholt discloses the claimed range. The Examiner instead concluded it would have been an obvious product of routine optimization. Ans. 7-8. Appellants have not presented persuasive

arguments to address this position. Br. 10-12. Third, necking has been addressed above. Fourth, while Litchholt does not expressly disclose cutting the web into resultant garments, this step is implicitly taught by Litchholt because one of ordinary skill in the art would understand Litchholt's goal is to make a plurality of diapers from the web or roll. Col. 24, l. 65 – col. 25, l. 1. As pointed out by the Examiner, Buell, incorporated by reference into Litchholt, expressly describes that forming discrete diapers from a web includes severing after lamination. Buell col. 12, ll. 9-15, fig. 1. Fifth, leg elastics have been discussed above.

We turn next to Appellants' arguments concerning the rejection under 35 U.S.C. § 103(a). Br. 9-12. Appellants contend Litchholt teaches away from affixing elastic strands in a nontensioned state. Br. 10-11 (*citing* Litchholt col. 28, ll. 17-21). This argument is unpersuasive. Litchholt recognizes that the elastomeric member 76 may be affixed to the topsheet 24 or backsheet 26 in an untensioned or tensioned condition. Col. 30, ll. 11-28. Thus, Litchholt cannot be said to teach away from attaching the elastomeric member in an untensioned condition.

Appellants' final argument is that Litchholt teaches away from the claimed invention by disclosing an elastic adhesive foam because one of ordinary skill in the art would not expect to use a separate adhesive to affix the foam. Whether Litchholt teaches away from using a separate adhesive need not be addressed since such a limitation is not found in the claims. Litchholt, therefore, cannot be said to teach away from the *claimed* invention.

DECISION

For the above reasons, the Examiner's rejection of claims 1, 3, 4, 6, 11-15, 28, 29, 32 and 33 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2009).

AFFIRMED

nhl

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